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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 67

HELEN MAXINE LEVI TRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 176

UNITED STATES OF AMERICA, APPELLANT

v.

LEE LEVI LAUB, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court in No. 67 (TR. 94–100)[1] are reported at 241 F. Supp. 468, 472. The order of the district court dismissing the indictment

[1] "TR." represents the printed record in this Court in No. 67 and "LR." represents the record in No. 176.

in No. 176 (LR. 5–7) is unreported. The opinion of the district court in the related case of *United States* v. *Laub* (LR. 8–62) is reported at 253 F. Supp. 433. The opinion of the court of appeals in No. 67 (TR. 109–112) is reported at 353 F. 2d 506.

JURISDICTION

No. 67.—The judgment of the court of appeals (TR. 112) was entered on November 19, 1965, and a petition for rehearing was denied on January 4, 1966 (TR. 133). The petition for a writ of certiorari was filed on January 28, 1966, and was granted on April 18, 1966 (TR. 113; 384 U.S. 903). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

No. 176.—The district court's order dismissing the indictment was entered on May 5, 1966 (LR. 5–7). A notice of direct appeal to this Court was filed on May 20, 1966 (LR. 63), and this Court noted probable jurisdiction on June 13, 1966 (LR. 64; 384 U.S. 984). The jurisdiction of this Court rests upon 18 U.S.C. 3731 because the district court's dismissal of the indictment was "based upon the * * * construction of the statute upon which the indictment * * * is founded."

QUESTIONS PRESENTED

The questions presented in both cases are:

1. Whether violations of area restrictions upon international travel imposed by the Secretary of State are criminally punishable under Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b).

2. Whether Section 215(b), if so construed, is constitutional.

Additional questions presented in No. 67 are:

1. Whether Section 215(b) applies to travel to Cuba, although the provision was not expressly cited in the promulgating clause of the regulation imposing the restriction upon travel to that area.

2. Whether the President properly declared a state of national emergency justifying the imposition of area restrictions.

3. Whether petitioner violated Section 215(b) by leaving the United States for Mexico with the intention of traveling to Cuba if that country would admit her, and by thereafter traveling to Cuba.

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The statutes, proclamations, executive orders and regulations involved are set out in the Appendix, pp. 45–47, *infra*.

STATEMENT

Prior to 1961, no passport was required for travel in the Western Hemisphere, including Cuba. 22 Fed. Reg. 10836. On January 3, 1961, the United States broke diplomatic and consular relations with Cuba. Subsequently, citing the Passport Act of 1926 (22 U.S.C. 211a) and Executive Order 7856 (3 Fed. Reg. 799, 805–806), the Secretary of State on January 16, 1961, issued Public Notice 179 (26 F.R. 492) (pp. 55–56, *infra*), which declared all outstanding United States passports to be invalid for travel to or in Cuba "unless specifically endorsed for such travel under the authority of the Secretary of State." A

companion press release (Press Release No. 24; pp. 56–57, *infra*) stated that the Department of State contemplated granting exceptions to these travel restrictions for "persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests." On January 16, 1961, the Secretary issued Departmental Regulation 108.456 (26 Fed. Reg. 482) which, by amending 22 C.F.R. 53.3, excluded Cuba from the countries of North, Central and South America for which a valid passport is not required.

No. 67.—Petitioner was charged in a two-count indictment in the United States District Court for the Southern District of California with having willfully departed from the United States for Cuba via Mexico without a passport valid for Cuba, in violation of Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b) (TR. 1–2). Waiving trial by jury (TR. 48–49), she was tried on stipulated facts (TR. 49–52), and was convicted on both counts (TR. 101). She was sentenced to concurrent suspended six-month terms of imprisonment on each count and to pay a total fine of $1,000 (TR. 102–103). The court of appeals affirmed the conviction (TR. 109–112).

According to the stipulation, petitioner, an American citizen, obtained tourist permits to travel to Mexico in January and August 1962 (TR. 50, 51). On both occasions, she left the United States for Mexico (once by plane and once by automobile) with the intention of there seeking from the Cuban au-

thorities permission to travel to Cuba and of traveling from Mexico to Cuba if such permission were granted (*ibid.*). She did not then possess a passport specifically endorsed for travel to Cuba,[1] and she knew of 22 C.F.R. 53.3(b) (p. 54, *infra*), which then excluded Cuba from the areas of the Western Hemisphere for which no passport is required (TR. 51). On each occasion, some time after arriving in Mexico, petitioner applied to the Cuban authorities and received from them permission to enter Cuba. She then boarded a plane which left from the Central Airport in Mexico to Havana, Cuba (TR. 50–51). While in Cuba she traveled, observed and took photographs, and subsequently reported on her trips to various groups in the United States (TR. 51–52).

No. 176.—Appellees were charged in a one-count indictment filed in the United States District Court for the Eastern District of New York with conspiring to violate Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b), by inducing, recruiting and arranging for the travel to Cuba of American citizens who did not possess passports

[1] The stipulation states only that "[a]t no time pertinent or material herein did defendant * * * bear a valid United States passport specifically endorsed for travel to the Republic of Cuba" (TR. 51). Hence the record is unclear as to whether petitioner had no passport at all, a revoked or expired passport, or a passport which was valid except for travel to restricted areas. The district court in the *Laub* case was advised informally by the judge in *Travis* that petitioner "did not have *any* unexpired passport when she made the two departures for Cuba" (LR. 24; emphasis in original). We have been advised that she possessed a *revoked* passport. See pp. 43–44, *infra*.

valid for travel to that country (LR. 1–2). The indictment alleged that it was part of the appellees' conspiracy to promote and solicit such unlawful travel by American citizens and to arrange for transportation to Cuba "by way of Europe" (LR. 2). In response to a motion for a bill of particulars, it was alleged that the individuals whose travel had been solicited possessed "unexpired and unrevoked United States passports which * * * had not been specifically validated by the Secretary of State for travel to Cuba" (LR. 4).

The district court granted appellees' motion to dismiss the indictment (LR. 5–7), incorporating into its judgment by reference its opinion in *United States* v. *Laub*, a companion case involving two of the appellees and two other defendants, who had been indicted on a similar charge relating to an earlier trip to Cuba (LR. 8–62). In that case, which had been tried before the same district judge without a jury, the court had acquitted the defendants on the ground that departures from the United States with unexpired and unrevoked passports do not violate Section 215(b) even if the departing individuals contemplate travel to an area upon which a restriction has been imposed by the Secretary of State (LR. 45).

SUMMARY OF ARGUMENT

I

A. In *Zemel* v. *Rusk*, 381 U.S. 1, this Court sustained the power of the Secretary of State to refuse to validate passports for travel to Cuba, but it reserved the question whether an individual who de-

parts the United States to engage in such travel violates Section 215(b) of the Immigration and Nationality Act of 1952. 381 U.S. at 18-20. The language of Section 215(b) is broad enough to cover such conduct. It requires every citizen who departs the United States during a national emergency to bear a "valid" passport. The "validity" of a passport turns not merely on whether it is unexpired and unrevoked; the statutory definition of the term "passport" indicates that Congress deemed validity "for * * * entry * * * into a foreign country" as an integral part of such a document. A passport which is invalid for the country to which the traveler is destined is, therefore, as defective under Section 215(b) as an expired or revoked passport.

The district court in *Laub* erroneously assumed that Section 215(b) was merely a "border control" measure. In fact, it is quite clear that in carving out exemptions to the prohibitions of Section 215(b), the Executive has distinguished among travelers on the basis of the countries to which they are traveling. Hence the statute cannot be read as a mere "departure and entry" provision.

B. The legislative history of Section 215(b) must be read in light of the Department of State's wartime passport practices because the Congresses which enacted such legislation during the World Wars were expressly providing wartime measures only. During World War I, the Department of State validated passports only "for specific countries and for specific purposes." Section 215(b)'s command that a "valid" passport be possessed by any citizen leaving

the United States in time of war or national emergency—which was copied from similar statutes passed in 1918 and 1941—must be read as referring to that practice. In light of that practice, Congress could not have been intending in 1918 and 1941 to permit departures for geographic areas other than those for which travelers' passports were specifically validated.

To be sure, the Department of State has not called this application of Section 215(b) to public attention as much as it might have, and State Department representatives have occasionally suggested that no criminal sanctions lie behind the Secretary's area restrictions. Neither these statements—many of which are ambiguous—nor the various unsuccessful attempts to enact legislation dealing more specifically with this problem than does Section 215(b) are, however, determinative of the issue of statutory construction presently before the Court. See *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. The Department of State's recent view is clearly expressed in the endorsement on passports which warns travelers that if they go to a geographically restricted area, they "may be liable for prosecution under Section [215]."

C. The defendants in these cases cannot complain that they were not given ample warning. They knew that travel to Cuba would violate a condition of their passports and that the possession of a "valid" passport was a condition of departure. This is not a case in which conduct which might have been thought to be totally innocent has been subjected to criminal punishment.

II

A. This Court's rejection of the constitutional arguments made in *Zemel* v. *Rusk*, 381 U.S. 1, notwithstanding its recognition that refusal to validate passports for travel to Cuba deters travel to that area, is a complete answer to the First and Fifth Amendment challenges made by the defendants in these cases. Having held that a restriction upon foreign travel is an inhibition upon action and not upon speech, this Court should reject the claim made by petitioner Travis that the power to permit travel to Cuba confers a censor's discretion upon the Secretary of State.

B. The excessive delegation argument was similarly made and rejected in *Zemel*. The Executive has necessarily been granted broad discretion in the area of foreign relations because of the volatile nature of international relations. Congress created the crime—departure without a valid passport—and left to the Secretary only the standards of validity. There is, consequently, no substance to the claim that the Executive has been given the power to determine what conduct will be criminal.

III

Section 215(b) applies even though that provision was not cited in the promulgating clause of the "Excluding Cuba" regulation. The defendants were charged with violating the statute, not the regulation; hence there is no need to find a specific reference in the regulation to the authority conferred by the statute. Moreover, Section 215 is cited in the official reporter of governmental regulations.

IV

The presidential proclamations which are the "triggers" for Section 215 are still in effect and their basis is not a subject for judicial examination. The statute confers only on the Executive and on Congress the power to repeal the state of national emergency which brings into play the restrictions of Section 215.

V

Petitioner Travis departed the United States with the intention of traveling to Cuba if that country would admit her. Area restrictions would be meaningless if her subsequent entry into Cuba were not deemed criminal simply because it was not certain at the time of her departure that Cuba would permit her to enter.

ARGUMENT

I

AMERICAN CITIZENS WHO LEAVE THE UNITED STATES DURING A NATIONAL EMERGENCY BOUND FOR A DESTINATION WITH RESPECT TO WHICH THEIR PASSPORTS ARE INVALID VIOLATE SECTION 215(b) OF THE IMMIGRATION AND NATIONALITY ACT

In *Zemel* v. *Rusk*, 381 U.S. 1, this Court sustained the power of the Secretary of State to impose area restrictions upon travel abroad by American citizens. The Court held that the power had been conferred by the Passport Act of 1926, 22 U.S.C. 211(a), which generally authorized the Secretary of State to "grant and issue passports * * * under such rules as the President shall designate and prescribe * * *." While noting that neither the legislative history nor

the language of the 1926 Act expressly manifests an intention to authorize area restrictions, the Court held that the breadth of the statutory language and the Executive's consistent practice—well known to Congress—of imposing such restrictions during periods of national emergency warranted the conclusion that Congress "intended in 1926 to maintain in the Executive the authority to make such restrictions." 381 U.S. at 9. Our contention that Section 215(b) subjects to criminal penalties any American citizen who departs the United States for an immediate or ultimate destination with respect to which his passport is invalid rests on much the same considerations.

Section 215(b) does not, in so many words, prohibit violations of area restrictions; it speaks, as the district court noted in the *Laub* case (L.R. 42), in the language of "border control statutes regulating departure from and entry into the United States." But, for reasons explained below, we believe that, as in *Zemel*, the text is broad enough to encompass departures for geographically restricted areas, and the consistent practice known to Congress when Section 215(b) and its predecessor were enacted renders it unlikely that Congress intended to leave the large gap in enforcement of area restrictions which would result from the decision of the district court in *Laub*.[1]

[1] We take as our premise and do not repeat here the history of the Cuban threat to the security of the Western Hemisphere and of area restrictions in general which are discussed in great detail in our brief in *Zemel* v. *Rusk*, No. 86, O.T. 1964, pp. 21–66. On the basis of that material, the Court concluded in *Zemel* that the restriction upon travel to Cuba was "supported by the weightiest considerations of national security." 381 U.S. at 16.

282-642—66——3

A. THE LANGUAGE OF SECTION 215(b) IS BROAD ENOUGH TO COVER VIOLATIONS OF AREA RESTRICTIONS

Section 215(b) declares it unlawful, in times of war or national emergency, for any citizen of the United States "to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." On its face, the statute requires not only that the traveler possess a passport when he departs, but that the passport be a "valid" one. The district court in *Laub* construed the adjective "valid" as relating only to whether the passport has been revoked or has expired. In so doing, the court overlooked a third element—*i.e.*, whether the passport has been validated for the traveler's intended destination. Our position, stated succinctly, is that a passport's "validity" within the meaning of Section 215(b) does not alone depend on its status as unexpired and unrevoked; it is "valid" only for such travel as the Secretary of State authorizes. Having the power to issue passports, the Secretary also has the necessarily included power of imposing conditions and limitations upon the validity of such documents. No one would argue that the Secretary may not fix a period of years less than the statutory maximum (22 U.S.C. 217a) for which a passport is to be valid. Anyone then departing with an out-of-date passport has clearly violated Section 215(b). The same result obtains, we submit, when the passport is invalid on another ground. Thus, today, when passports are declared "invalid" until the bearer signs on a designated line, departure with an unsigned passport likewise violates the statute. Similarly, we submit, Section 215(b) would

apply to a citizen who left the country in violation of a restriction on departures by certain kinds of vehicles—assuming these were a rational and permissible basis for such a restriction. In sum, any condition of validity which the Secretary imposes is as much an element of a passport's "validity" for purposes of Section 215(b) as the passport's expiration date.

1. Indeed, the condition which these cases involve—a limitation upon the foreign states to which the passport is addressed—is related in a much more fundamental sense to the essential nature of a passport than technical conditions such as an expiration date. "Passport" is defined in Section 101(30) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(30), as follows (emphasis added):

> The term "passport" means any travel document issued by competent authority showing the bearer's origin identity, and nationality if any, *which is valid for the entry of the bearer into a foreign country.*

The concluding language of the above definition demonstrates that a "travel document" which otherwise appears to be a passport is not a passport in the statutory sense until it is validated "for entry * * * into a foreign country." This Court observed in *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699, that a passport "is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely * * *." If a traveler is destined for a foreign country with a passport which is not "addressed" to the government of that country,

he is traveling with no passport at all. For, as the Department of State observed in a 1957 response to a Senate committee, a passport "is always a request to another government for safe conduct of the bearer." *Hearings Before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957), p. 59. In the same response, the Department noted its position that an endorsement on a passport reading "'Not valid to go to country X' * * * means that as far as the United States is concerned, the passport is not valid for use in travel to country X." *Ibid.*

To be sure, as this Court observed in *Kent* v. *Dulles*, 357 U.S. 116, 129, the age-old function of a passport is presently its subordinate role; "[i]ts crucial function today is control over exit." But whether it suffices as a document controlling exit is not the complete test of a passport's validity. The statute defines passport as a document "valid for the entry of the bearer into a foreign country" not as one "valid for the departure of the bearer from the United States." This choice of language must mean that a passport does not meet the statutory conditions unless, so far as the Secretary of State has the power to do so, he has authorized the bearer not only to depart the United States but to enter the country to which he is destined.

Nor can the words "entry * * * into a foreign country" be read as meaning "entry * * * into *any* foreign country," thereby validating for purposes of departure under Section 215(b) a travel document which authorizes entry into a foreign country other than that to which the traveler is destined. A docu-

ment authorizing entry into country *X* and thereby addressed to the government of *X* is hardly of use to a traveler destined for *Y*. It does, of course, inferentially authorize him to leave the United States, but it does not, in any meaningful sense, authorize entry. Having determined that a necessary constituent of a passport be that it "is valid for * * * entry," Congress could not rationally have intended that a validation for any entry whatever—even if it be to a country in which the traveler has no prospect of setting foot—satisfies this requirement. We submit that Section 101(30) must be read as meaning that an authorizing travel document qualifies as a "passport" only if it is valid for entry into the foreign country or countries to which the traveler is destined. It follows, then, that the prohibition in Section 215(b) against departures without "valid" passports bars departures with passports which are invalid for the foreign country to which the traveler is destined.

This conclusion is further supported by the obvious gap which affirmance of the judgment in *Laub* would leave in the implementation of the important foreign policy considerations which underlie area restrictions. For if Section 215(b) does not make travel to Cuba criminal, there is no real way to prevent the entry into Cuba of individual citizens, who may have no baser motive than curiosity but who can thereby "involve the Nation in dangerous international incidents." *Zemel* v. *Rusk*, 381 U.S. 1, 15. The provisions in the Criminal Code relating to misuse of passports (18 U.S.C. 1541–1546), particularly Section

1544, which prohibits use of a passport "in violation of the conditions or restrictions therein contained," would not appear to apply when, as is usually the case, entry into the prohibited area is accomplished without "use" of the passport. There is no indication, in other words, that petitioner Travis exhibited or otherwise "used" her passport in gaining entry to Cuba. And the provision governing the making of false statements in an application for a passport would plainly not apply if no application were made (*i.e.*, if a passport previously issued for another trip were used for travel to Cuba) or if the application listed only other foreign countries which the traveler intended to visit.

The construction of Section 215(b) which the district court and court of appeals adopted in the *Travis* case and which we urge here was also adopted by the Court of Appeals for the Fifth Circuit in *Worthy* v. *United States*, 328 F. 2d 386. While the court there reversed a conviction under Section 215(b) for having unlawfully entered the United States,[4] it noted (328 F. 2d at 391; emphasis added):

> The appellant puts forward the proposition that the intent and purpose of the Congress was to make criminal clandestine departures from or

[4] Worthy, a newsman, traveled to Cuba without a passport. He was indicted for and convicted of a violation of section 215(b) in that he *entered* the United States without a valid passport. The Court held that the entry provision of the statute was unconstitutional because it deprived a citizen of his "inherent" right to reenter his own country. No such constitutional inhibition exists on the prohibition of departure without a valid passport. The court of appeals noted that it would have had a different case under the provision of the statute prohibiting departure, 328 F. 2d at 393.

> entries to the United States, and because there was no attempt to conceal his entry, the act did not apply to him. The statute was enacted, beyond doubt, for the purpose stated by the appellant, but it reached much further. *It was the clear intent of the statute to require passports for foreign travel, with some exceptions, to permit reasonable restrictions to be placed upon foreign travel, and to impose criminal penalties for willful violations.* * * *

The position we take here was also approved by the district court in *MacEwan* v. *Rusk*, 228 F. Supp. 306, 310 (E.D. Pa.), affirmed, 344 F. 2d 963 (C.A. 3), which reasoned:

> If the statute is broad enough to prohibit the departure of a citizen from the United States without a valid passport, it is difficult to see why a partial barrier is not within the statute. If departure may be entirely prohibited, then surely departure may be permitted except to restricted areas, on the familiar principle that the greater necessarily includes the lesser power. * * *

And in *United States* v. *Healy*, 376 U.S. 75, 83, n. 7, this Court assumed, in passing, that Section 215 applied to the restriction upon travel to Cuba.[4]

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[4] Appellees had been indicted for forcing the pilot of a private plane to fly them from Florida to Cuba. The court said: However, it may be observed that a trip to Cuba would have been lawful only if appellees had had passports specifically endorsed for travel to Cuba. See Presidential Proclamations No. 2914, Dec. 16, 1950 (64 Stat. A454); and No. 3004, Jan. 17, 1953 (67 Stat. C31); § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185; Department of State Public Notice 179, 26 Fed. Reg. 492, Jan. 16, 1961.

2. The principal error of the district court in *Laub* and of the petitioner in *Travis* (see Travis Br. 11, 20, 23, 25, 35) is their assertion that Section 215(b) is merely a "departure and entry" or "border control" statute and was not intended to regulate the destination of American citizens traveling abroad (LR. 35–37, 41, 45). The most persuasive evidence that Section 215(b) is and always was considered a statute authorizing limitations upon travelers' destinations is the consistent administration of the "exception" proviso of Section 215(b). The statute declares unlawful departures without a valid passport "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe" (p. 47, *infra*). If Section 215(b) were merely a "departure and entry" provision and were not concerned with the destinations of those leaving the United States, it would plainly be out of keeping with the statute's tenor to issue exceptions which depend upon where a traveler is headed. Yet, as the district court noted in *Laub*, exceptions promulgated by the President shortly after the original version of the statute was enacted in 1918 fell into two categories: (1) "Military and naval personnel, as well as other classes of government personnel, were permitted to depart and enter without bearing valid passports"; (2) "Americans travelling between the United States and Canada, likewise, were not required to be the bearers of valid passports upon departure and entry (this exception was eventually expanded to include the entire Western Hemisphere)" (LR. 43). See 22 C.F.R. 53.3;

p. 54, *infra*. The first of these categories is, we agree, an exception to a "departure and entry" prohibition. The second, however, cannot be reconciled with the proposition that the statute was designed only as a form of "border control" (I.B. 43). It plainly distinguishes among travelers on the basis of their destinations. An individual without a passport who departs for a Central American country commits no offense; the same traveler destined for Europe violates Section 215(b).

The fact that the President may excuse travelers to Central America from the passport obligation of Section 215(b) does not *ipso facto* establish that the statute gives him the power to make certain destinations impermissible. But it does demonstrate that the statute accords the Executive the authority to reach beyond a travelers' bare departure from the United States and to impose obligations dependent upon the countries to which he is destined. For example, the regulation which exempts travelers in the Western Hemisphere from the passport requirement contains a proviso which makes the exemption inapplicable if the Western Hemisphere country is merely a way-station on a trip to a place for which a valid passport is required. 22 C.F.R. 53.3(b); p. 54, *infra*. That proviso is clearly a permissible exercise of the power which Section 215(b) confers on the President to issue "such limitations and exceptions as [he] may authorize and prescribe" (p. 47, *infra*). The "limitations and exceptions" power may, we submit, as readily be exercised to incorporate into the "validity" of a passport the power conferred on the Secretary

of State to impose area restrictions—which was upheld by this Court in *Zemel* v. *Rusk*, 381 U.S. 1—as to exempt other geographical areas entirely from the passport requirement—a power nowhere specifically delegated to any Executive official. Since, as we have shown, Congress did not intend to deny the President the power to make the criminal sanctions of Section 215(b) contingent upon a traveler's destination, those sanctions apply when, as here, the travelers departed from the United States destined for a country to which their passports had been endorsed as "not valid."

B. THE LEGISLATIVE HISTORY AND ADMINISTRATIVE INTERPRETATION OF SECTION 215(b) ARE CONSISTENT WITH ITS APPLICATION TO VIOLATIONS OF AREA RESTRICTIONS

We agree with the district court in *Laub* (LR. 42) and with petitioner in *Travis* (Travis Br. 22–24) that the most pertinent legislative history is that of the passage of the Act of May 22, 1918, 40 Stat. 559, since it was that statute which was substantially reenacted in 1941 (55 Stat. 252) and as Section 215 of the Immigration and Nationality Act of 1952. The House and Senate reports pertaining to the bill which became the 1918 Act are meager, and they do not address themselves to the question whether the statute was to be deemed violated by those who traveled from the United States contrary to area restrictions. See H. Rep. No. 485, 65th Cong., 2d Sess. (1918); S. Rep. No. 431, 65th Cong., 2d Sess. (1918). Nor do the debates on the floor of either chamber show any awareness of this problem by the sponsors of the legislation or those who questioned them. See 56

Cong. Rec. 6029–6032, 6061–6068 (House), 6191–6195, 6246–6248 (Senate). The district court drew from this silence the inference that Congress was not then concerned with *where* departing citizens traveled, but only with *whether* they were permitted to depart. But that conclusion overlooks the Department of State's then outstanding passport policies. For the reasons stated below, we believe that the 1918 legislation, *construed in light of what Congress then knew regarding wartime passport policies*, was intended to subject to criminal sanctions any person who departed in violation of a geographical restriction in his passport.

The 1918 Act was passed as a war measure (see 56 Cong. Rec. 6030, 6191);* indeed, unlike Section 215(b), it was expressly applicable only "when the United States is at war" (40 Stat. 559). It was the subject of unpublished hearings before the House Committee on Foreign Affairs (56 Cong. Rec. 6030), and among the witnesses testifying in support of the legislation at the hearings were the Acting Secretary of State, the Counsellor of the Department of State and the Chief of the Bureau of Passports. 56 Cong. Rec. 6031. After hearing their testimony, it is hardly probable that the House Committee and, through it, the Congress itself, were unaware of the wartime passport policy of the Department of State, summarized in a 1957 response to questions from the Sen-

* The Chairman of the House Committee on Foreign Affairs (Rep. Flood) was asked (56 Cong. Rec. 6030):

> Mr. Moore of Pennsylvania. The gentleman advances this as a war measure and puts it on that ground?
>
> Mr. Flood. Absolutely. It is limited to the duration of the war.

ate Committee on Foreign Relations (*Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957), pp. 63–64):

> For some years prior to the outbreak of World War I, passports were valid for all countries. Beginning December 9, 1914, passports were made valid for specific countries and for specific purposes. This practice continued throughout the war. * * *
>
> In other words, a passport issued during World War I was not, like the analogous document issued today, a general authorization to travel with enumerated exceptions. It was, instead, issued "for specific countries and for specific purposes," and was valid only for the limited travel endorsed thereon.
>
> The Congress which passed the Act of 1918 doubtless knew of this wartime form of passport. Having enacted a statute which made a "valid passport" a necessary condition of wartime departure from the United States, Congress could not, we submit, have

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With the outbreak of World War I, the following endorsement was placed on passports which were issued or submitted for renewal (9 Am. J. Int'l L. (Spec. Supp. 1915) 383):

> The person to whom this passport is issued has declared under oath that he desires it for use in visiting the countries hereinafter named, for the following objects:
>
> (Name of country.) (Object of visit.)
>
> (Name of country.) (Object of visit.)
>
> (Name of country.) (Object of visit.)
>
> This passport is not valid for use in other countries except for necessary transit to or from the countries named, unless amended by an American diplomatic or principal consular officer.

intended to leave the gap which the district court in *Laub* believed had been left—*i.e.*, to impose no criminal penalty upon individuals leaving from the United States for destinations other than those for which their passports had been endorsed. What Congress must have intended was to close the country's borders altogether except to the extent travel was specifically authorized by an appropriate governmental agency. Any citizen departing without a "valid passport"—*i.e.*, without any passport at all or without a passport endorsed for his destination—was subject to criminal sanctions.

The Act of 1918, in other words, imposed the existing State Department policies regarding passports on any citizen planning to depart from or enter the country. It was then standard practice, of several years' standing, to limit all passports for travel to defined areas. That practice must have been what Congress had in mind when it prescribed a "valid passport" as a condition of departure. The statute was intended, we submit, to make it unlawful to travel to areas for which the State Department refused to issue a passport. The effect was not limited to enemy territory, for in 1919 the Department refused to issue passports for "unnecessary" travel to Europe. The Department explained (3 Hackworth, *Digest of International Law* (1942), p. 530):

> The passport restrictions are maintained first because the Department deems it inadvisable in general to allow unnecessary travel between this country and Europe before peace has been declared, and second, because of conditions in Europe, particularly in the shortage of food

and overtaxing of transportation and other services.

The 1918 statute lapsed, by its own terms, with the end of the war, and the passport-bearing requirement was not reenacted into law until World War II. In the interim, the Department of State had imposed area restrictions upon Ethiopia, China and Spain. And, with the beginning of hostilities in Europe, the Department of State again required (except for travel in the Western Hemisphere) that passports "set forth the specific countries to be visited and the purpose of the travel." *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies,* 85th Cong., 1st Sess. (1957), p. 64. See Department Order No. 811, 4 Fed. Reg. 3892. Against that background, Congress in 1941 substantially reenacted the 1918 statute, again prescribing a "valid passport"—which meant, in light of the existing practice, one that set forth the specific countries to be visited and the purpose of the travel"—as a condition of departure. (Act of June 21, 1941, 55 Stat. 252.) Some indication of the meaning ascribed to the 1941 legislation emerges from the President's subsequent issuance of regulations listing the exceptions to the 1941 act, which stated, as does the present 22 C.F.R. 53.8 (p. 55, *infra*), that (6 Fed. Reg. 6070):

> Nothing in these rules and regulations shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the

purpose of restricting its validity or use in certain countries.

The 1952 statute has, as the district court noted in *Laub*, "no independent legislative history" (L.R. 42). But relevant in determining Congress' understanding of the term "valid passport" is the fact that area restrictions had been imposed on travel to Hungary and Czechoslovakia in 1951 and that in May 1952—one month before the enactment of the Immigration and Nationality Act of 1952—the Department of State announced that thereafter all passports would be stamped (State Department Press Release No. 341, May 1, 1952, 26 Dept. of State Bull. 736):

> This passport is not valid for travel to Albania, Bulgaria, China, Czechoslovakia, Hungary, Poland, Rumania, or the Union of Soviet Socialist Republics unless specifically endorsed under authority of the Department of State as being valid for such travel.

Our argument with respect to the history of these acts rests, therefore, not on what legislative reports or debates expressly say. It is founded rather on the premises from which Congress must have proceeded when it passed the statutes of 1918, 1941 and 1952. On each occasion, the Department of State's passport policy was geographically restrictive: a passport was "valid" only for certain destinations. In enacting Section 215(b) and its predecessors Congress must, we believe, have incorporated this standard of validity into the statute.

The district court in *Laub* placed substantial reliance on the fact that Section 215(b) does not ex-

pressly prohibit travel to proscribed areas as well as * * * prohibit departure and entry" (LR. 11). But the fact that Congress framed the statute in general terms, thereby incorporating whatever permissible standards of validity the Secretary of State might deem it prudent to impose, does not mean that it intended to withhold the power to impose area restrictions. The general purpose of the statute was, we believe, to subject departures from this country to stricter controls in a variety of ways, among which were the regulation of travelers' destinations. A more specific enumeration of that particular restriction might have been construed (under the maxim *inclusio unius exclusio alterius*) as intended to deprive the Secretary of the power to impose other kinds of conditions.

Moreover, Congress may well have been reluctant to subject to criminal punishment within the United States the bare act of "travel to proscribed areas" because that would appear to be extraterritorial legislation. The criminal act would, under such a statute, consist of no more than the crossing of a foreign border. By framing Section 215(b) as it did, Congress subjected to criminal sanctions the act of departing the United States with specific intent to enter a prohibited area. The fact that the realization of that intent—*i.e.*, the crossing of the foreign border—may also be an essential element of that offense does not render the present statute extraterritorial. The offense defined by Section 215(b) hinges on the validity of the passport; whether or not the passport is valid depends upon the destina-

tion to which the traveler actually goes. If he never enters a restricted area he has not, irrespective of his state of mind, departed without a valid passport. The departure is the nub of the offense. The entry into the restricted area is a term of condition subsequent, just as, for example, the commission of an overt act would be under the federal conspiracy statute, 18 U.S.C. 371.

Nor are the petitioner in *Travis* (Travis Br. 32-35) and the district court in *Laub* (LBR. 38-41) correct in relying on the failure of the Congress to enact proposed legislation to make the violation of area restrictions a crime. Because Section 215(b) was not as explicit in prohibiting violations of area restrictions as it might be, the President and the Department of State have repeatedly sought to put the matter beyond dispute. That is common practice. As the Court recently noted in *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 610, "[p]ublic policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations" (quoting from *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47). But, as the Court there concluded, "requests by government agencies and the resulting nonaction of the Congress [should not be construed] as affirmative evidence of no authority." 384 U.S. at 610. See also, *United States* v. *du Pont & Co.*, 353 U.S. 586, 590; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-349.

It is true that press releases of the Department of State issued in 1919 and 1952 when travel restrictions were imposed did not suggest that Section 215(b) was

applicable or that criminal sanctions might be invoked if area restrictions were violated. See LR. 35–36; Travis Br. 26–27; 3 Hackworth, *Digest of International Law* (1942), p. 530; 26 Dept. of State Bull. 736. But these omissions by the agency charged with administration of the passport provisions are far less substantial than the numerous affirmative disclaimers of agency power which this Court deemed unpersuasive in *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 636–640 (Appendix to dissenting opinion).[8]

The 1952 press release is, moreover, somewhat ambiguous. After announcing that passports would be stamped not valid for travel in Iron Curtain countries, the release said (Press Release No. 341, 26 Dept. of State Bull. 736):

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[8] Petitioner Travis also relies on the Department of State's 1957 response to the Senate Committee on Foreign Relations in which it advised the Committee that the endorsement of an area restriction on a passport "does not necessarily mean that if the bearer travels to country *X* he will be violating the criminal law" (Travis Br. 30–32). The statement is not inconsistent with our present position for two reasons: *First*, Section 215(b) applies only in times of war or national emergency, while the authority to make the restrictive endorsement is not so limited. Compare Section 211a of the Passport Act of 1926, 22 U.S.C. 211a. Consequently, the Department was right in responding that travel in violation of an area restriction is not "necessarily" a violation of the criminal law; it is no violation if there is no national emergency in effect. *Second*, the bearer of a passport with a restrictive endorsement may travel to "country *X*" and not be violating the criminal law if he forms the intention of going there after he has left the United States. It is only if his intended destination when he leaves is country *X* that he can be criminally prosecuted under Section 215(b) if he subsequently enters that country.

> In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas. It contemplates that American citizens will consult the Department or the Consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized.

If the first sentence of this paragraph stood alone it would be fair to conclude that there is no criminal sanction for travel to areas upon which passport restrictions have been imposed. But we submit that the second sentence casts an entirely different meaning upon the whole paragraph, which may be fairly read as saying the following: "By imposing area restrictions the Department is not absolutely prohibiting travel to these areas. If the dangers of travel in these areas are reduced at any particular time or in the case of any particular person, permission to travel will be granted." Such a reading does not, of course, conflict with the view we take here—that departure in violation of area restrictions is forbidden under pain of criminal sanctions.

Irrespective of the implications of its press release, the Department of State generally took the position in Congressional hearings that Section 215(b) applied to departures in violation of area restrictions. See Testimony of Acting Director, Bureau of Security and Consular Affairs, in ***Hearings on the Right to Travel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,***

85th Cong., 1st Sess. (1957), pp. 88-91. The testimony of an earlier administrator of the same bureau, to which the district court referred in *Laub* (LR. 36-37), is plainly unsound and could not have reflected the considered view of the Department of State. That witness testified before a 1956 House committee that a traveler who wished to circumvent the passport requirement of Section 215(b) could leave the United States without a passport for a Western Hemisphere country and go from there to a European destination without violating any prohibition of American law. He said that "once they have left the United States, any inhibitions on travel abroad are not as a result of our laws, but the laws of other countries." *Hearings on the Immigration and Nationality Act before a Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess. (1956), Ser. 24, p. 4. This conclusion conflicts squarely with the regulations promulgated by the President pursuant to his power to issue exceptions to Section 215(b). For 22 C.F.R. 53.3(b) authorizes departures without a passport to Western Hemisphere countries *only* if they are the traveler's ultimate destination. The proviso in that subsection makes the exception inapplicable if the traveler's destination is "a place outside the United States for which a valid passport is required" (p. 54, *infra*). Hence it must be the Department of State's view that Section 215(b) is applicable—because no exception authorizes departure without a passport—if a traveler uses a Western Hemisphere country as a mere waystation for travel to some other destination.

The Department's view that Section 215(b) applies to departures for destinations which violate area restrictions has been expressed in an endorsement placed on passports since January 1961. Following the stamp which lists the countries upon which area restrictions have been imposed, the following notice appears (LR. 22):

> A Person Who Travels To Or In The Listed Countries Or Areas May Be Liable For Prosecution Under Section 1185, Title 8, U.S. Code, And Section 1544, Title 18, U.S. Code.

This warning, we submit, formally expresses the view of the Executive department regarding the applicability of Section 215(b) and it puts travelers such as the defendants in these cases on notice that criminal sanctions are prescribed for their violations of area restrictions.

C. THE STATUTE AND REGULATIONS PROVIDE FAIR WARNING THAT VIOLATIONS OF AREA RESTRICTIONS ARE CRIMINALLY PUNISHABLE

The district court in *Laub* supported its conclusion that Section 215(b) did not reach the conduct alleged in the indictment and bill of particulars by invoking the doctrine that criminal statutes should be strictly construed (LR. 41–42). Petitioner Travis makes the related contention that Section 215(b), even if read together with the applicable regulations, is unconstitutionally vague as applied here because it fails to notify travelers that violations of area restrictions are criminally punishable (Travis Br. 36–45). However the argument is phrased, it appears to us to raise essentially the question of fair warning which

this Court considered recently in *Bouie* v. *City of Columbia*, 378 U.S. 347. We submit that the defendants in these cases, unlike the petitioners in *Bouie*, had more than ample notice that their conduct was impermissible. They were not engaging in totally innocent conduct which, but for an unexpected construction of a criminal statute, would not be subject to any punitive measures whatever.

It was stipulated that petitioner Travis knew of the applicable regulations and of the provisions of Section 215(b) (TR. 51). The appellees in *Laub* may fairly be presumed, on the allegations of this indictment, to have known of the restrictions on travel to Cuba and of the endorsement on their passports advising them that prosecution under Section 215(b) was a possibility. (See also the facts of the related case, LR. 11–13.) The fact that the defendants may have disagreed with State Department officials and believed, as the district court did in *Laub*, that Section 215(b) did not make their conduct criminal does not mean that they were not given fair warning. For they plainly knew that their violations of area restrictions might result in the revocation of their passports. Consequently, they were not taken by surprise. These cases are, therefore, quite unlike *Raley* v. *Ohio*, 360 U.S. 423, and *Kraus & Bros.* v. *United States*, 327 U.S. 614, where those who were convicted of crime had no reason for believing that they were engaging in anything other than wholly lawful conduct.

II

SECTION 215(*b*) MAY CONSTITUTIONALLY BE APPLIED TO VIOLATIONS OF AREA RESTRICTIONS

A. THE PROHIBITION UPON TRAVEL TO DESIGNATED AREAS DOES NOT VIOLATE THE FIRST OR FIFTH AMENDMENT

The basic constitutional issue was resolved by *Zemel* v. *Rusk*, 381 U.S. 1, in which this Court noted that the governmental power there being challenged—*i.e.*, the Secretary of State's refusal to validate a passport for a given geographic area—"acts as a deterrent to travel to that area." 381 U.S. at 14. The Court held that it was constitutionally permissible to impose governmental restrictions of this kind upon the "liberty" of travel protected by the Fifth Amendment because such restrictions rest upon "the weightiest considerations of national security." 381 U.S. at 14–16. The Court also held that no First Amendment right was at issue because the inhibition on travel to Cuba (or other geographically restricted areas) "is an inhibition of action" (381 U.S. at 16) and not of speech. Those conclusions fully control this case and answer the First and Fifth Amendment challenges to Section 215(b)'s effective prohibition on travel to Cuba (Travis Br. 58–61).

There is no substance to petitioner Travis' claim that this case involves different questions under the First and Fifth Amendments because it imposes a criminal penalty, and does not merely authorize the withdrawal of governmental assurances of safe passage. So far as the First Amendment is concerned, this Court's conclusion in *Zemel* that no First

Amendment right is involved is as applicable to a criminal prohibition as to a civil inhibition. As for the Fifth Amendment claim, the considerations which led this court to conclude that travel to Cuba may be deterred in the interests of national security also support the conclusion that a criminal sanction is permissible. Indeed, there was no suggestion in *Zemel* that the absence of a criminal sanction in the statute there at issue affected the Court's determination of the constitutional claim. Compare, for example, *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402.

Petitioner Travis also attacks the Secretary's discretion to authorize travel to Cuba in individual cases on the ground that this confers on the Secretary a "censorial" power in the First Amendment area (Travis Br. 62–64). This contention is unsound. The Court held in *Zemel* that travel to a foreign country is not a right protected by the First Amendment; consequently, the Secretary is not licensing speech when he determines who may and who may not travel to Cuba. Nor is there any basis for assuming that the Secretary has used his discretion to inhibit free speech by granting permission only to those who express certain views. The authorization to endorse passports as valid for travel to Cuba is merely a recognition of the fact that, notwithstanding the general policy of deterring travel to that country, there may be instances when travel should be permitted. In the absence of any showing that the discretion is being abused, there is no constitutional flaw in the conferral of such power on the Secretary.

B. SECTION 215(b) DOES NOT IMPERMISSIBLY DELEGATE LEGISLATIVE POWER

Petitioner Travis argues that Section 215(b) is unconstitutional because it delegates broad legislative power to the Executive (Travis Br. 54–58). The basic delegation claim was fully answered by this Court in *Zemel* v. *Rusk*, 381 U.S. 1, 17–18, where a grant to the Executive of even more general statutory authority was deemed constitutionally permissible in the area of contemporary international relations because of its "changeable and explosive nature." 381 U.S. at 17. That consideration applies fully here. See, also, *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 109–110; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 324.

The claim that the broad authority which has always been thought permissible in the area of foreign relations is not appropriate when a criminal statute is involved (Travis Br. 54–55) is beside the point. For in this statute Congress did not delegate to the Secretary the power to *create* a crime. Congress defined the crime—departing the United States without a valid passport—and left to the Department of State the details concerning a passport's validity.

Nor is there substance to the claim that Section 215(b), unlike Section 211a of Passport Act of 1926, did not adopt the prior administrative practice as a standard by which to define the powers it delegated (Travis Br. 56–58). The statute involved in this case was enacted more than a quarter of a century after the provision construed in *Zemel*, and its "content" may also be taken "from history." 381 U.S. at 18.

To the extent, in other words, that Section 215(b) empowers the Executive to make "limitations and exceptions" and to the extent that it authorizes area restrictions, they must be of the same kind as those with which Congress was acquainted in 1952. Whether or not the Department of State had specifically focused on the imposition of criminal penalties for violations of area restrictions prior to 1952 is irrelevant. By requiring "valid" passports as a condition of departure Congress was empowering the Secretary of State to continue to impose such conditions and restrictions *upon the validity of* a passport as he had therefore imposed. And area restrictions were, as we have shown, among those with which Congress was well acquainted.

III

THE FAILURE TO CITE SECTION 215(b) IN THE PROMULGATING CLAUSE OF THE "EXCLUDING CUBA" REGULATION DID NOT MAKE THE STATUTE INAPPLICABLE

Petitioner Travis contends that she could not be criminally prosecuted for having traveled to Cuba because Section 215(b), the statute providing the criminal sanction, was not cited by the Secretary in the promulgating clause of the "Excluding Cuba" regulation. Petitioner's contention is that Section 215(c) authorizes criminal punishment only for the violation of the statute itself or of regulations issued "thereunder" (p. 47, *infra*). Since the "Excluding Cuba" regulation was allegedly not issued "under" Section 215, it is argued that travel to Cuba could not be a crime (Travis Br. 46–54). There are two answers to this argument.

First, petitioner errs in assuming that she was convicted of having violated a regulation. As her indictment demonstrates, she was accused of having violated the statute itself—Section 215(b)—by having departed the United States without a valid passport (TR. 1–2). Our theory is (pp. 11–15, *supra*) that one element of the passport's validity was whether travel to petitioner's destination had been authorized. Section 215 does not require that the Secretary expressly invoke that provision whenever he establishes standards by which passports are validated. If, for example, a citizen of the United States departs with an unsigned or expired passport or with one from which his photograph was missing, he would be violating the statute because his passport is invalid at the time of his departure. It would hardly be a defense to a prosecution under Section 215(b) that the Secretary did not invoke that statute when he made the traveler's signature a condition of a passport's validity.

A reading of the whole statute, including Section 215(a), demonstrates that when Section 215(c) speaks of violations of regulations it is referring not to the standards of validity which the Secretary prescribes but to the regulations under which aliens are permitted to enter and depart from the United States under Section 215(a)(1) (p. 46, *infra*). That clause delegates broad power to the Executive to establish the rules for such departure and entry, and it is for violation of these rules that Section 215(c)'s provision concerning "permit[s], rule[s], or regula-

tion[s] issued thereunder" provides a criminal sanction. This language is inapplicable to petitioner; the Secretary was not required, in other words, to act under the authority of Section 215 in establishing standards of validity for citizens' passports.

Second, even if petitioner's offense is viewed as a violation of a regulation which must, to be punishable under Section 215, be specifically promulgated under the authority of that section, there was sufficient reliance on Section 215 in the official notice of the "Excluding Cuba" regulation to make the statute applicable. As printed in the Federal Register (26 F.R. 482), the official reporter of governmental regulation, an express reference to "Sec. 215, 66 Stat. 190; 8 U.S.C. 1185 and Executive Order 3004" follows the text of the amended regulations. Reference is also made to Section 215 in the amended regulation as printed in 22 C.F.R. 53.3 (pocket supplement). That this reference appears in parentheses and smaller type is attributable to printing form and cannot be taken as proof that the Secretary of State did not rely on Section 215 in framing the regulation. The Rules of the Code of Federal Regulations specifically provide that this form should be followed in designating the authority for an individual section of the Code (1 C.F.R. xxvi):

> In general, each section of the Code is followed by a citation of statutory authority under which the section was issued * * * The authority for an individual section is designated by enclosure in parentheses at the end of the section.

The Code also makes this provision applicable to the printing of regulations in the Federal Register (1 C.F.R. (1965) 17.50):

> Authority covering a single section shall be cited in parentheses on a separate line immediately following the text of the section. * * *

Thus, although Section 215 does not appear in the public notice or press release issued by the Secretary of State, it is expressly set out in both official publications of government regulations.

IV

A STATE OF NATIONAL EMERGENCY HAD BEEN DECLARED AND IT EXISTED AT THE TIME OF PETITIONER TRAVIS' DEPARTURES

Section 215 applies, by its terms, only during a war or national emergency and after a finding and proclamation by the President "that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States * * *" (p. 45, *infra*). A national emergency was declared by the President on December 16, 1950 (Presidential Proclamation No. 2914, pp. 49-50, *infra*), and on January 17, 1953, the President issued Presidential Proclamation No. 3004, in which he found that additional restrictions and prohibitions upon the departure of persons from and entry into the United States was required by the national emergency (pp. 50-53, *infra*). The proclamation subjected the departure and entry of citizens to the regulations of the Secretary of

State, who was authorized "to revoke, modify or amend such regulations as he may find the interests of the United States to require" (pp. 52–53, *infra*).

There is no merit whatever to petitioner Travis' contention that the latter proclamation was inadequate because it failed specifically to advert to the need for geographic area restrictions (Travis Br. 65–66). As we have previously noted (p. 25, *supra*), area restrictions upon travel to eight Iron Curtain countries had been imposed in May 1952. When the proclamation of January 17, 1953 was issued, its reference to additional "restrictions and prohibitions" must have been intended to include the area limitations which had only recently been felt necessary as well as any other reasonable regulation the Secretary might impose. In any event, the statute did not require the President to enumerate in detail the kinds of restrictions he believed appropriate; the "trigger" which brings Section 215 into play is merely the finding and announcement that added restrictions are needed.

Petitioner Travis also contends that notwithstanding the President's failure to repeal either of the two proclamations and the statute's directive that its limitations apply "until otherwise ordered by the President or the Congress" (p. 46, *infra*), this Court should presently re-examine the basis for the finding of national emergency and determine that it no longer exists (Travis Br. 66–69). The statute, however, expressly confers authority to terminate the state of emergency (insofar as it relates to Section 215) only upon the President and Congress; the courts are as-

signed no role in that regard. Moreover, determinations such as these, involving an evaluation of the international political scene, have always been thought to be exclusively a matter for the Executive. See *United States* v. *Curtis-Wright Corp.*, 299 U.S. 304; *United States* v. *Belmont*, 301 U.S. 324; *United States* v. *Pink*, 315 U.S. 203; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103.*

V

PETITIONER TRAVIS VIOLATED SECTION 215(b) EVEN THOUGH SHE DID NOT OBTAIN CUBA'S PERMISSION TO ENTER THAT COUNTRY UNTIL AFTER HER DEPARTURES FROM THE UNITED STATES

There is, finally, no substance to petitioner Travis' contention that Section 215(b) did not apply to her departure because she did not, as of the moment when she crossed the border, have Cuba's consent to her entry into that country (Travis Br. 69–72). As we have indicated above (pp. 26–27, *supra*), we believe that Section 215(b) makes it a criminal offense to depart from the United States with the intention of traveling, either immediately or ultimately, to a destination to which one's passport is not valid, and thereafter to enter that foreign country. The traveler's

* We also note that the continued existence of the national emergency has been reaffirmed by Presidents since the Korean War. On November 29, 1960, President Eisenhower issued Executive Order No. 10896 (3 C.F.R. (1960 Supp.) 89) and on July 24, 1962, President Kennedy issued Executive Order No. 11037 (3 C.F.R. (1962 Supp.) 230). Both Orders refer to the continued existence of the national emergency proclaimed by President Truman in Proclamation 2914 of December 16, 1950.

practical obstacles or restrictions imposed by foreign law do not bear on this offense. If petitioner were able to avoid Section 215(b) on the ground that Cuba had not yet given its consent when she departed the United States, another traveler would similarly be able to claim that, as of the time of his departure, he did not yet possess the funds which enabled him to travel to Cuba (although he had every intention of earning them during his travels).[10] Obviously such circumstances are not a defense because the gravamen of the crime is departure with a specific intent—which petitioner concededly had (TR. 50–51). The subsequent entry into the foreign country may be an essential element, but how probable it was at the time of departure is no part of the offense.

The only authority cited to support petitioner's argument is *Heikkinen* v. *United States*, 355 U.S. 273. But in that case the Court holding that there can be no wilful *failure* to depart the United States until the country willing to receive the alien is identified. Petitioner erroneously attemps to draw from the *Heikkinen* case the negative inference that one cannot wilfully depart from the United States until a country has officially agreed to receive him. Wilful failure to depart and wilful departure are entirely

[10] Similarly, American citizens could resort to the same argument if they used Canada as a waystation for travel to Europe—to which a passport is required. It would be an obvious evasion of 22 C.F.R. 53.3(b) if a citizen could delay requesting a visa for a European country until he had arrived in Canada without a passport, and then contend that since he was unable to enter Europe without a visa until he arrived in Canada his departure—albeit with the necessary intent—was not a violation of Section 215(b).

different. One cannot wilfully fail to depart when he has nowhere to go, but he can wilfully depart, without a valid passport, regardless of whether the country of his destination has formally guaranteed acceptance prior to his departure.

We also note, with respect to petitioner Travis, that there is substantial doubt in the present state of the record whether she possessed any passport at all on her departures from the United States. The stipulation states only that she did not, at the pertinent times, "bear a valid United States passport specifically endorsed for travel to the Republic of Cuba" (TR. 51). It does not disclose whether she had an otherwise valid passport or whether she had none. The district judge in *Laub* said that he had been advised that she did not possess *any* unexpired passport (LR. 24), and we have been advised that she possessed a revoked passport (see note 2, *supra*, p. 5).

Whether petitioner possessed any passport at all is irrelevant to the principal issue presented by these cases since, if we are right, citizens who possess an otherwise valid passport which is invalid for Cuba are in no different posture with respect to departures for Cuba than citizens who possess no passport at all. But if the Court should disagree, it would not follow that departures for restricted areas are not punishable by Section 215(b) if the departing traveler bears no passport whatever. Petitioner was plainly no more privileged to travel to Havana without an unexpired and unrevoked passport then to travel to Paris. It is stipulated that she had knowledge of the "Excluding Cuba" regulation (TR. 51). Consequently, she

knew that Cuba was not one of the Western Hemisphere countries to which travel without a passport is permitted. Even if, contrary to our principal argument, she could not be criminally punished for violating the area restriction imposed on Cuba, she could be punished for leaving for that ultimate destination—for which the President provided no "exceptions"—without possessing an unrevoked or unexpired passport.

The stipulation is, as we have noted, unclear. In these circumstances, even if the Court were to agree with the district court in *Laub*, we believe it would be appropriate for the Travis case to be remanded under 28 U.S.C. 2106—either for further proceedings in which the meaning of the stipulation could be clarified or for a new trial on the indictment. *Bryan* v. *United States*, 338 U.S. 552.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in No. 67 should be affirmed and the judgment in No. 176 should be reversed and the case remanded for trial.

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APPENDIX

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS AND REGULATIONS

The Act of July 3, 1926, § 1, 44 Stat. 887, 22 U.S.C. 211a, provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insural possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. 1185, provides, in pertinent part, as follows:

> TRAVEL CONTROL OF CITIZENS AND ALIENS DURING WAR OR NATIONAL EMERGENCY—RESTRICTIONS AND PROHIBITIONS ON ALIENS
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of per-

sons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence or permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

CITIZENS

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

PENALTIES

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment or both; and any vehicle, vessel, or aircraft together with its appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

DEFINITIONS

(d) The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

(e) Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

REVOCATION OF PROCLAMATION AS AFFECTING PENALTIES

(f) The revocation of any proclamation, rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeitures, liability for which was incurred under this section prior to the revocation of such proclamation, rule, regulation, or order.

PERMITS TO ENTER

(g) Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

Section 156 of 5 U.S.C. provides as follows:

Management of foreign affairs. The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the department, and he shall conduct the business

of the department in such manner as the President shall direct.

Executive Order No. 7856 of 1938, March 31, 1938, 3 Fed. Reg. 681, 22 C.F.R. 51.75–51.77, reads, in pertinent part, as follows:

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a pasport for the purpose of restricting its validity or use in certain countries.

§ 51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

* * *

§ 51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, provides, in pertinent part, as follows:

A Proclamation

Whereas recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

Whereas world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

* * * * * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, "Control of Persons Leaving or Entering the United States By the President of the United States," provides, in pertinent part, as follows:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163,

190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW THEREFORE, I HARRY S TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States, and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

3. The entry of aliens into the Canal Zone and American Samoa shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.21 to 53.41, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such

regulations as he may find the interests of the United States to require.

* * * * *

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

* * * * *

Sections 53.1–53.8 of 22 C.F.R. provide, in pertinent part, as follows:

"Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency

AMERICAN CITIZENS AND NATIONALS

§ 53.1 *Definition of the term "United States".* The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 *Limitations upon travel.* No citizen of the United States or person who owes alle-

giance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3

§ 53.3 *Exceptions to regulations in § 53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands and Guam, or between any such places; or

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also,* That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman: *Provided,* That the person is in possession of a specially validated United States merchant mariner's document issued by the United States Coast Guard; or

* * * * *

(h) When specifically authorized by the Secretary of State through appropriate official channels, to depart from or enter the United

States, as defined in § 53.1. The fee for granting an exception under this subsection is $25.

* * * * *

§ 53.5 *Prevention of departure from or entry into the United States.* * * *

§ 53.6 *Attempt of a citizen or national to enter without a valid passport.* * * *

* * * * *

§ 53.8 *Discretional exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

Public Notice 179, 26 Fed. Reg. 492, promulgated on January 16, 1961, provides:

"DEPARTMENT OF STATE

[Public Notice 179]

United States Citizens

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in

Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for Administration."

Press Release No. 24, issued by the Secretary of State on January 16, 1961, provides:

PRESS RELEASE NO. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

U.S. GOVERNMENT PRINTING OFFICE:1990

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SUPREME COURT OF THE UNITED STATES

No. 176.—October Term, 1966.

United States, Appellant, v. Lee Levi Laub et al.	On Appeal From the United States District Court for the Eastern District of New York.

[January 10, 1967.]

Mr. Justice Fortas delivered the opinion of the Court.

Appellees were indicted under 18 U. S. C. § 371 for conspiring to violate § 215 (b) of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185 (b). The alleged conspiracy consisted of recruiting and arranging the travel to Cuba of 58 American citizens whose passports, although otherwise valid, were not specifically validated for travel to that country.[1]

The District Court granted appellees' motion to dismiss the indictment. Chief Judge Zavatt filed an exhaustive opinion (253 F. Supp. 433). Notice of direct appeal to this Court was filed and we noted probable jurisdiction under 18 U. S. C. § 3731 because the dismissal was "based upon the . . . construction of the statute upon which the indictment . . . is founded." We affirm. Our decision rests entirely upon our construction of the relevant statutes and regulations.

Two statutes are relevant to this case. The first is the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. § 211a. This is the general statute authorizing the Secretary of State to "grant and issue passports." It is not a criminal statute. The second statute is § 215 (b) of the Immigra-

[1] In response to a motion for a bill of particulars, the Government alleged that the individuals concerned possessed "unexpired and unrevoked United States passports which . . . had not been specifically validated by the Secretary of State for travel to Cuba."

tion and Nationality Act of 1952, *supra*, under which the present indictments were brought. Section 215 (b) was enacted on June 27, 1952. It is a re-enactment of the Act of May 22, 1918 (40 Stat. 559), and the Act of June 22, 1941 (55 Stat. 252). It provides that:

> "When the United States is at war or during the existence of any national emergency proclaimed by the President . . . and [when] the President shall find that the interests of the United States require that restrictions and prohibitions . . . be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, *it shall . . . be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.*" (Italics added.)

Wilful violation is subjected to a fine of not more than $5,000 or imprisonment for five years, or both.

On January 17, 1953, President Truman made the finding and proclamation required by § 215 (b).[2] As a consequence, a valid passport has been required for departure and entry of United States nationals from and into the United States and its territories, except as to areas specifically exempted by regulations. The Proclamation adopted the regulations which the Secretary of State had promulgated under the predecessors of § 215 (b) exempting from the passport requirement departure to or entry from "any country or territory in North, Central, or South America [including Cuba]." 22 Cir. CFR § 53.3 (b) (1958 rev.). On January 3, 1961, the United States broke diplomatic relations with

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[2] Proclamation No. 3004, 67 Stat. C 31, 3 CFR 180 (1949–1953 Comp.). The current "National Emergency" was proclaimed by President Truman on Dec. 16, 1950. Proclamation No. 2914, 64 Stat. A 454, 3 CFR 99 (1949–1953 Comp.).

Cuba. On January 16, 1961, the Deputy Under Secretary of State for Administration issued the "Excluding Cuba" amendment (22 CFR § 53.3 (1965 ed.), 26 Fed. Reg. 482). That amendment added the two words "excluding Cuba" to the phrase quoted above. Cuba was thereby included in the general requirement of a passport for departure from and entry into the United States.

On the same day, the Department of State also issued Public Notice 179, which stated that "Hereafter United States passports shall not be valid for travel to or in Cuba unless specially endorsed for such travel under the authority of the Secretary of State. . . ." 26 Fed. Reg. 492. It simultaneously issued a press release announcing that:

> ". . . *in view of the U. S. Government's inability,* following the break in diplomatic relations between the United States and Cuba, *to extend normal protective services to Americans visiting Cuba,* U. S. citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports . . . are being declared invalid for travel to Cuba unless specifically endorsed for such travel. . . . *These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.*"[1] (Italics added.)

In *Zemel* v. *Rusk*, 381 U. S. 1 (1965), the petitioner sought a declaratory judgment that the Secretary of State does not have statutory authorization to impose area restrictions on travel; that if the statute were con-

[1] State Department Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178. The full text is in the Appendix to this opinion.

strued to authorize the Secretary to do so, it would be an impermissible delegation of power; and that, in any event, the exercise of the power to restrict travel denied to petitioner his rights under the First and Fifth Amendments. This Court rejected petitioner's claims and sustained the Secretary's statutory power to refuse to validate passports for travel to Cuba. It found authority for area restrictions in the general passport authority vested in the Secretary of State by the 1926 Act, relying upon the successive "imposition of area restrictions during both times of war and periods of peace" before and after the enactment of the Act of 1926. 381 U. S., at 8–9. The Court specifically declined the Solicitor General's invitation to rule also that "travel in violation of an area restriction imposed on an otherwise valid passport is unlawful under the 1952 Act." *Id.*, at 12.[4]

We now confront that question. Section 215 (b) is a criminal statute. It must therefore be narrowly construed. *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96, 105 (1820) (Marshall, C. J.). Appellees urge that § 215 (b) must be read as a "border control" statute, requiring only that a citizen may not "depart from or enter" the United States without "a valid passport." On this basis, they argue, appellees did not conspire to violate the statute since all of those who went to Cuba departed and re-entered the United States bearing valid passports. Only if, as the Government urges, § 215 (b) can be given a broader meaning so as to encompass specific destination control—only if it is read as requiring the traveler to bear "a passport endorsed as valid for travel to the country for which he departs or from which he returns"—would appellees be guilty of any violation.

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[4] But cf. *United States* v. *Healy*, 376 U. S. 75, 83, n. 7 (1964).

We begin with the fact, conceded by the Government, that "Section 215 (b) does not, in so many words, prohibit violations of area restrictions; it speaks, as the district court noted in the *Laub* case . . . in the language of 'border control statutes regulating departure from and entry into the United States.'" Brief for the United States, p. 11. Nevertheless, the Government requests us to sustain this criminal prosecution and reverse the District Court on the ground that somehow, "the text is broad enough to encompass departures for geographically restricted areas . . . ." *Ibid.* We conclude, however, that in this criminal proceeding, the statute cannot be applied in this fashion. Even if ingenuity were able to find concealed in the text a basis for this criminal prosecution, factors which we must take into account, drawn from the history of the statute, would preclude such a reading.

Preliminarily, it is essential to recall the nature and function of the passport. A passport is a document identifying a citizen, in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers. See *Urtetique* v. *D'Arcy*, 9 Pet. 692, 699 (1835); *Kent* v. *Dulles*, 357 U. S. 116, 120–121 (1958); 3 Hackworth, Digest of International Law 435 (1942); 8 U. S. C. § 1101 (a)(30).

As this Court has observed, "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law. . . ." *Kent* v. *Dulles*, *supra*, 357 U. S., at 125. See *Aptheker* v. *Secretary of State*, 378 U. S. 500, 517 (1964); *Zemel* v. *Rusk*, 381 U. S. 1 (1965).

Under § 215 (b) and its predecessor statutes, Congress authorized the requirement that a citizen possess a passport for departure from and entry into the United

States,[5] and there is no doubt that with the adoption and promulgation of the "Excluding Cuba" regulation, a passport was required for departure from this country for Cuba and for entry into this country from Cuba. Departure for Cuba or entry from Cuba without a passport would be a violation of § 215 (b), exposing the traveler to the criminal penalties provided in that section. But it does not follow that travel to Cuba with a passport which is not specifically validated for that country is a criminal offense. Violation of the "area restriction"—"invalidating" passports for travel in or to Cuba and requiring specific validation of passports if they are to be valid for travel to or in Cuba—is quite a different matter from violation of the requirement of § 215 (b) and the regulations thereunder that a citizen bear a "valid passport" for departure from or entry into the United States.

The area restriction applicable to Cuba was promulgated by a "Public Notice" and a press release, *supra*, p. 3, neither of which referred to § 215 (b) or to criminal sanctions. On the contrary, the only reference to the statutory base of the announcement appears in the "Public Notice," and this is a reference to the nonpenal 1926 Act and the Executive Order adopted thereunder in 1938.[6] These merely authorize the Secretary of State to impose area restrictions incidental to his general

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[5] It is the exception rather than the rule in our history to require that citizens engaged in foreign travel should have a passport. *Kent v. Dulles*, 357 U. S. 116, 121–123 (1958); Jaffe, The Right To Travel: The Passport Problem, 35 Foreign Affairs 17 (1956).

[6] The "Public Notice" recites that "pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 FR 681, 687, 22 CFR 51.75 and 51.77) under authority of . . . the Act of . . . July 3, 1926 . . . all United States passports are hereby declared to be invalid for travel to or in Cuba. . . ." Department of State, Public Notice No. 179, Jan. 16, 1961, 26 Fed. Reg. 492.

powers with respect to passports. *Zemel* v. *Rusk*, *supra*. They do not purport to make travel to the designated area unlawful.

The press release issued by the Department of State at the time expressly explained the action as being "in view of the U. S. Government's inability . . . to extend normal protective services to Americans visiting Cuba." It explained that the action was taken in conformity with the Department's "normal practice" of limiting travel to countries with which we do not have diplomatic relations.[1] That "normal practice," as will be discussed, has not included criminal sanctions. In short, the relevant State Department promulgations are not only devoid of a suggestion that travel to Cuba without a specially validated passport is prohibited, or that such travel would be criminal conduct, but they also contain positive suggestions that the purpose and effect of the restriction were merely to make clear that the passport was not to be regarded by the traveler in Cuba as a voucher on the protective services normally afforded by the State Department.

This was in keeping with the unbroken tenor of State Department pronouncements on area restrictions. Prior to enactment of § 215 (b) on June 27, 1952, area travel restrictions were proclaimed on five occasions while the 1918 and 1941 Acts were in effect (1918–1921 and 1941–1953).[2] These were the predecessors of § 215(b), and

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[1] State Department, Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178. The full text is in the Appendix to this opinion.

[2] The 1918 Act was in effect by Presidential proclamation only between August 8, 1918, and March 3, 1921. (40 Stat. 1829 and 41 Stat. 1359.) The 1941 Act was in effect by successive Presidential proclamations and congressional extensions from November 14, 1941 (55 Stat. 1696) to April 1, 1953 (66 Stat. 57, 96, 137, 333), by which date § 215 (b) was already in effect by Presidential Proclamation No. 3004, Jan. 17, 1953, 67 Stat. C 31, 3 CFR § 180 (1949–1953 Comp.).

they similarly specified criminal sanctions.[9] But in each of the five instances, the area restrictions were devoid of any suggestion that they were related to the 1918 or 1941 Acts or were intended to invoke criminal penalties if they were disregarded. They were cast exclusively in civil terms, relating to the State Department's "safe passage" functions.[10] In two of these instances, the Department of State specifically emphasized the civil, nonprohibitory nature of the restrictions.[11] For example, in 1952 the State Department issued area restrictions with respect to Eastern European countries, China, and the Soviet Union. The Department's press release emphasized that the "invalidation" of passports for travel to those areas "in no way forbids American travel to those areas."[12]

Since enactment of § 215 (b), the State Department has announced area travel restrictions upon three occasions in addition to Cuba.[13] Again, although § 215 (b) was fully operative, none of these declarations purported to be issued under that section or referred to criminal

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[9] See p. 2, *supra*.

[10] 1. Restriction in 1919 as to Germany (3 Hackworth, Digest of International Law 530 (1942). 2. Restriction in 1950 as to Bulgaria and Hungary (22 Dept. State Bull. 399). 3. Restriction in 1951 as to Czechoslovakia (24 Dept. State Bull. 932). 4. Restriction in 1951 as to Hungary (26 Dept. State Bull. 7). 5. Restriction in 1952 as to East European countries, China, and the Soviet Union (26 Dept. State Bull. 736).

[11] These were the 1919 Germany restriction and the 1952 East Europe, Soviet Union, and China restriction. See n. 10, *supra*. The texts of the Department's announcements of these restrictions are in the Appendix to this opinion.

[12] See the Appendix to this opinion.

[13] 1. Restriction in 1955 to Albania, Bulgaria, China, North Korea, and North Viet Nam (33 Dept. State Bull. 777). 2. Restriction in 1956 as to Hungary (34 Dept. State Bull. 248). 3. Restriction in 1956 as to Egypt, Israel, Jordan, and Syria (35 Dept. State Bull. 756, 21 Fed. Reg. 8577).

sanctions. Each of them, like the Cuba regulation, sounded in terms of withdrawal of the safe-passage services of the State Department.[14]

In 1957, the Senate Foreign Relations Committee asked the Department: "What does it mean when a passport is stamped 'not valid to go to country X'?" After three months, the Department sent its official reply. It stated that this stamping of a passport "means that if the bearer enters country X he *cannot be assured of the protection* of the United States. . . . [but it] *does not necessarily mean that if the bearer travels to country X he will be violating the criminal law.*"[15] (Italics added.) Similarly, in hearings before another Senate Committee, a Department official explained that when a passport is marked "invalid" for travel to stated countries, this means that "this Government is not sponsoring the entry of the individual into those countries and does not give him permission to go in there under the protection of this Government."[16]

Although Department records show that approximately 600 persons have violated area travel restrictions since the enactment of § 215 (b),[17] the present prosecutions

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[14] In the 1956 area restriction relating to Egypt, Israel, Jordan, and Syria, *supra*, n. 13, as well as the Cuba restriction, the Department expressly recited the 1926 Act as its basis. It did not mention § 215 (b). 21 Fed. Reg. 8577.

[15] Hearings before the Committee on Foreign Relations, United States Senate, on Department of State Passport Policies, 85th Cong., 1st Sess. (1957), p. 59.

[16] Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, on the Right To Travel, 85th Cong., 1st Sess., part 2 (1957), p. 86; see also *id.*, at p. 62.

[17] The Government conceded this to the court below. See also the Department's testimony to the same effect in Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Committee on the Judiciary, United States Senate, S. 3243, 89th Cong., 2d Sess. (1966),

are the only attempts to convict persons for alleged area transgressions.[18]

Until these indictments, in fact, the State Department had consistently taken the position that there was no statute which imposed or authorized such prohibition. In the 1957 hearings, referred to above, the Acting Director of the Bureau of Security and Consular Affairs, Department of State, testified that he knew of no statute providing a penalty for going to a country covered by an area restriction without a passport (as distinguished from departing or entering the United States).[19] The Government, as well as others, has repeatedly called to the attention of the Congress the need for consideration of legislation specifically making it a criminal offense for any citizen to travel to a country as to which an area restriction is in effect,[20] but no such legislation was enacted.[21]

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p. 43. The Chief of the Security Branch of the Legal Division of the State Department testified to the court below that he was unaware of any prosecution for violation of area restrictions under the predecessors of § 215 (b).

[18] See also *Travis* v. *United States*, No. 67, *post*; *Worthy* v. *United States*, 328 F. 2d 386 (C. A. 5th Cir., 1964).

[19] Hearings, n. 16 *supra*, at pp. 91–95.

[20] See, *e. g.*, President Eisenhower's request for legislation, H. R. Doc. No. 417, 85th Cong., 2d Sess. (1958). The Administration's bill was S. 4110, H. R. 13318. In 1957, the Commission on Government Security, specifically established by Congress to study travel and passport legislation, among other things (Public Law 304, 84th Cong., 1st Sess., 69 Stat. 595 (1955)), recommended that "Title 8, U. S. C. A., section 1185 (b), should be amended to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid." Report, at p. 475. The next year, the Special Committee To Study Passport Procedures of the Association of the Bar of the City of New York published a report entitled "Freedom To Travel." One of the authors of this Report was the Honorable Adrian S. Fisher, former

[*Footnote 21 on p. 11.*]

In view of this overwhelming evidence that § 215 (b) does not authorize area restrictions, we agree with the District Court that the indictment herein does not allege a crime. If there is a gap in the law, the right and the duty, if any, to fill it do not devolve upon the courts. The area travel restriction, requiring special validation of passports for travel to Cuba, was a valid civil regulation under the 1926 Act. *Zemel* v. *Rusk*, *supra*. But it was not and was not intended or represented to be an exercise of authority under § 215 (b), which provides the basis of the criminal charge in this case.

Crimes are not to be created by inference. They may not be constructed *nunc pro tunc*. Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. As this Court said in *Raley* v. *Ohio*, 360 U. S. 423, 438, we may not convict "a citizen for exercising a privilege which the State clearly had told him was available to him." As *Raley* emphasized, criminal sanctions are not supportable if they are to be imposed under "vague and undefined" commands (citing *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1959)); or if they

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Legal Advisor to the Department of State. This Report concluded, at p. 70, as to criminal enforcement of area restrictions:

"The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case."

[21] The most recent bill, introduced by the Department after two years of study, was H. R. 14895, 89th Cong., 2d Sess. (1966). See Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Committee on the Judiciary, United States Senate, S. 3243, 89th Cong., 2d Sess. (1966), p. 73. Some of the other bills which failed in Congress are discussed in the opinion of the court below.

are "inexplicably contradictory" (citing *United States* v. *Cardiff*, 344 U. S. 174 (1952)); and certainly not if the Government's conduct constitutes "active misleading" (citing *Johnson* v. *United States*, 318 U. S. 189, 197 (1943)).

In view of our decision that appellees were charged with conspiracy to violate a nonexistent criminal prohibition, we need not consider other issues which the case presents.

Accordingly, the judgment of the District Court is

Affirmed.

APPENDIX.

The following three Department of State statements in connection with area restrictions are referred to in the foregoing opinion:

(1) State Department Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178:

"The Department of State announced on January 16 that in view of the U. S. Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, U. S. citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of U. S. citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

"The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

"Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the U. S. Immigration and Naturalization Service.

"Federal regulations are being amended to put these requirements into effect.

"These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations."

(2) State Department Press Release No. 341, May 1, 1952, 26 Dept. State Bull. 736:

"The Department of State announced on May 1 that it was taking additional steps to warn American citizens of the risk of travel in Iron Curtain countries by stamping all passports not valid for travel in those countries unless specifically endorsed by the Department of State for such travel.

"In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas. It contemplates that American citizens will consult the Department or the Consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized.

"All new passports will be stamped as follows: 'THIS PASSPORT IS NOT VALID FOR TRAVEL TO ALBANIA, BULGARIA, CHINA, CZECHOSLOVAKIA, HUNGARY, POLAND, ROUMANIA OR THE UNION OF SOVIET SOCIALIST REPUBLICS UNLESS SPECIFICALLY ENDORSED UNDER AUTHORITY OF THE DEPARTMENT OF STATE AS BEING VALID FOR SUCH TRAVEL.

"All outstanding passports, which are equally subject to this restriction, will be so endorsed as occasion permits."

"Freedom to Travel," a 1958 Report of The Special Committee To Study Passport Procedures of the Association of the Bar of the City of New York, characterized this as "an honest admission of the lack of statutory power to enforce an area restriction of this nature." *Id.*, at p. 70. The Department gave a practical construction of this area restriction in 1954 when it informed two

newsmen desiring to travel to Bulgaria that they could go there without a passport and "use, as a travel document . . . an affidavit in lieu of a passport," and that, if Bulgaria would permit them entry, "the Department . . . would hold no objection." Hearings on Department of State Passport Policy before the Committee on Foreign Relations, United States Senate, 85th Cong., 1st Sess. (1957), p. 65.

(3) 3 Hackworth, Digest of International Law 530 (1942) (1919 Germany restriction):

> "The Department is not now issuing or authorizing issuance or amendment of passports for Germany. However, the Department interposes no objection to the entry into Germany of Americans who have important and urgent business to transact there. In view of the present situation, such persons should understand that they go upon their own responsibility and at their own risk. They cannot be guaranteed the same protection which they might expect under normal conditions."